

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE: REQUEST FOR
ADVISORY OPINION REGARDING
CONSTITUTIONALITY OF 2011 PA 38

Supreme Court No. 143157

**BRIEF AMICUS CURIAE OF THE MICHIGAN EDUCATION ASSOCIATION
OPPOSING THE CONSTITUTIONALITY OF 2011 PUBLIC ACT 38, ET AL.**

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JURISDICTIONAL STATEMENT

By Order dated June 15, 2011, this Court granted the request of the Governor for an advisory opinion on the constitutionality of the reduction or elimination of tax exemptions for pension incomes of public employees. As indicated in the Order, "Persons or groups interested in the determination of the questions presented in this matter may move the Court for permission to file briefs amicus curiae on either or both sides of the submitted questions."

STATEMENT OF QUESTIONS INVOLVED

- I. **WHETHER REDUCING OR ELIMINATING THE STATUTORY TAX EXEMPTION FOR PUBLIC-PENSION INCOMES IMPAIRS OR DIMINISHES ACCRUED FINANCIAL BENEFITS IN VIOLATION OF MICH CONST 1963, ART 9, § 24?**

Amicus Curiae MEA answers “Yes.”

- II. **WHETHER REDUCING OR ELIMINATING THE STATUTORY TAX EXEMPTION FOR PUBLIC-PENSION INCOMES IMPAIRS A CONTRACTUAL OBLIGATION IN VIOLATION OF MICH CONST 1963, ART 1, § 10, AND US CONST, ART I, § 10(1)?**

Amicus Curiae MEA answers “Yes.”

INTRODUCTION

Amicus MEA is a labor organization representing public school employees throughout the State of Michigan. The MEA has approximately 120,000 active members, almost all of whom will be directly affected by the elimination of the income tax exemption on their pension income. In addition, the MEA represents in excess of 125,000 members through its MEA-Retired and AIM programs. Most MEA active and retired members are members of the retirement system established by the Michigan Public School Employees' Retirement Act, MCL 38.1301, *et seq.* ("MPSERA"). MEA's members have a direct and substantial interest in the outcome of the questions before the Court.

By Order dated June 15, 2011, this Court granted the request of the Governor for an advisory opinion on the constitutionality of the reduction or elimination of tax exemptions for pension incomes of public employees. Four questions were submitted for review. This brief addresses only the first two questions: (1) whether elimination of the tax exemptions diminishes or impairs accrued financial benefits in violation of Mich Const 1963, art 9, § 24; and (2) whether elimination of the tax exemptions impairs contractual obligations in violation of Mich Const 1963, art 1, § 10 and US Const, art I, § 10(1).

This brief is supplemental to those already filed by the Attorney General, as well as amici Michigan State Employees Retirement Association Coordinating Council, *et al.* (hereinafter "SERACC") and the United Autoworkers Union ("UAW"), arguing that the repeal of the statutory tax exemptions for public employee pension income is unconstitutional under either analysis.

The MEA supports the arguments set forth by the Attorney General, the SERACC, and UAW, and offers this brief to emphasize the specific impact on the interests of its members and their particular retirement system.

In deciding this issue, consideration might be given to the words of Chief Justice Neely in *Booth v Sims*, 456 SE2d 167, 188 (W Va, 1994), where he stated:

Scores of thousands of little people have organized their lives around government pensions, and while in a democracy government has an opportunity for a new life and new direction every four years, these little people do not. While what was promised thirty years ago may not be of much concern to modernists elected to change the mix of government services, cut taxes, or instantiate a new morality, what was promised thirty years ago forms the core of life for those who once upon a time believed their elected leaders.

STATEMENT OF FACTS

The MEA adopts the statements of fact submitted by both the Attorney General and SERACC, and offers the following information for consideration.

A. History of Tax Exemptions Under the Michigan Public School Employees Retirement Act

Before the Constitutional Convention which led to art 9, § 24, and before the Income Tax Act of 1967 and its subsequent adoption in 1969 of the general tax exemption set forth therein as § 30, the MPSERA included among its financial benefits an express exemption from state taxes on pension income. The MPSERA's origins are found in 1945 PA 136. See then-MCL 38.201, *et seq.* At that time, § 25 of Chapter I of

MPSERA (then-MCL 38.225) included a provision for tax exemption similar to the one presently in place.¹

In 1980, the prior version of MPSERA was repealed and replaced through 1980 PA 300, § 107 (effective October 31, 1980). See MCL 38.1301, *et seq.* What was previously § 25 of Chapter I then became the current § 46 of the MPSERA, MCL 38.1346.

Over the years, § 46 has remained substantively intact. In its most recent form, § 46(1) provided:

A retirement allowance, an optional benefit, or any other benefit accrued or accruing to a person under this act, the reserves created by this act, and the money, investments, or income of those reserves are exempt from state, county, municipal, or other local tax and are subject to the public employee retirement benefit protection act, 2002 PA 100, MCL 38.1681 to 38.1689.

(Emphasis added.)

This tax exemption was subsequently altered by 2011 PA 42.

B. The 2011 Amendment to the MPSERA

As part of 2011 PA 42 (effective May 25, 2011), the tax exemption codified in § 46 of MPSERA was amended, *inter alia*, with the introduction of a new § 46(2):

Beginning January 1, 2012, a retirement allowance, an optional benefit, or any other benefit accrued or accruing to a person under this act is subject to state tax upon distribution to the person from the various funds created by this act.

MCL 38.1346(2).

¹ Prior to 2011, MPSERA was not the only public employee retirement system to expressly provide a tax exemption for financial benefits received by its members. Similar tax exempt status was provided under (a) the State Employees' Retirement Act, MCL 38.40; (b) the Michigan Legislative Retirement System Act, MCL 38.1057(1); (c) the City Library Employees' Retirement Systems, MCL 38.705; (d) and the Judges' Retirement Act, MCL 38.2670.

This amendment purported to repeal the tax exemption in place for over 65 years, and declared that financial benefits accrued or accruing under the MPSERA were now subject to taxation by the State upon distribution.

C. Relevant History of the Income Tax Act of 1967

Michigan adopted its general income tax statute in 1967 (1967 PA 281). It was not until 1969, however, that pension benefits received from a public retirement system were made deductible from taxable income. The statutory tax exemptions expressly included in the MPSERA and the other public retirement systems (with the exception of the Judges' Retirement Act) pre-date the Income Tax Act of 1967 and its general tax exemption in § 30. Thus, to the extent the other remaining public retirement systems did not provide an exemption from taxes, § 30 of the Income Tax Act now provided a "catch-all" tax exemption for their pension benefits.

Although the Governor requested an advisory opinion concerning the reduction or elimination of tax exemptions under § 30 of the Income Tax Act of 1967, MCL 206.30, as amended by 2011 PA 38, the tax exemption for members of the MPSERA retirement system is found in MCL 38.1346 and the amendments contained in 2011 PA 42.

ARGUMENT

I. REDUCING OR ELIMINATING THE STATUTORY TAX EXEMPTION FOR PUBLIC-PENSION INCOMES IMPAIRS OR DIMINISHES ACCRUED FINANCIAL BENEFITS IN VIOLATION OF MICH CONST 1963, ART 9, § 24

A. Standard of Review

The interpretation of a statute, including its constitutionality, presents a question of law which is reviewed *de novo*. *Associated Builders and Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005).

B. Discussion

The Michigan Constitution of 1963 did two things directly bearing on the issues before the Court. First, it removed any doubt where Michigan was aligned concerning the legal obligation represented by public employee pensions; it placed Michigan squarely among the jurisdictions to acknowledge pensions to be a form of deferred compensation for services rendered by the employee and therefore a contractual obligation of the public employer. Second, the new Constitution added a proviso stating that the accrued financial benefits each public employee had earned by services rendered could not be diminished or impaired by an act of the State. Whether the tax exemption contained in the MPSERA is considered part of the accrued financial benefits (which MEA believes to be the correct analysis), or whether the elimination of the exemption is the device by which the State diminishes or impairs those benefits, in either case, the elimination of the tax exemption would be unconstitutional to the extent it operates to tax benefits based on services already rendered.

1. **The “accrued financial benefits” protected by art 9, § 24 include the tax exemption in § 46 of the MPSERA**

The accrued financial benefits derived from each particular public pension plan or retirement system are constitutionally protected as contractual obligations of the public entity. Specifically, art 9, § 24 states:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions **shall be a contractual obligation** thereof which **shall not be diminished or impaired** thereby.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Mich Const 1963, art 9, § 24 (emphasis added).

While the first sentence of art 9, § 24 has received the most attention in this case, the second sentence underscores an important point -- the constitutional protections of art 9, § 24 are linked to the "service rendered in each fiscal year." See 1 Official Record Constitutional Convention 1961, p 770 ("It is the belief of the committee that the benefits of pension plans are in a sense deferred compensation *for work performed* . . . [and that] the public employee should have a contractual right to the benefits of the pension plan, which should not be diminished by the employing unit *after the service has been performed*."). See also, 1 Official Record Constitutional Convention 1961, p 774 ("Once the employee, *by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereon*, he has a contractual right to those benefits which may not be diminished or impaired.") (emphasis added).

Art 9, § 24 protects by its express terms the accrued financial benefits of each retirement system. However, those financial benefits are not established by art 9, § 24; but rather, by the terms of each particular retirement statute or ordinance prescribing the plan in question.² The right of a member of the MPSERA retirement system to receive a retirement allowance exempt from state, county, municipal, or local tax is every bit as much a financial benefit as any other aspect of the retirement plan. The tax exemption is part of the "then-prescribed level of benefits," part of the "terms of the statute . . . prescribing the plan," part of "the benefit structure presently provided,"³ that may not be diminished or impaired after services have been rendered. Indeed, it would be fair to consider the tax exemption the single most important of the financial benefits provided in the plan, since it has long been recognized that "the power to tax involves the power to destroy." *CF Smith Co v Fitzgerald*, 270 Mich 659, 677; 259 NW 352 (1935).

That statutory tax exemptions were a fundamental benefit of public pension plans was supported by the Attorney General in OAG 1991-1992, No. 6697, p 116 (December 18, 1991). At issue in OAG 6697 was whether a limitation or repeal of the income tax exemption in § 30(1)(f) of the Income Tax Act would affect the statutory

² "Once an employee, by working has performed the service in reliance upon *the then prescribed level of benefits*, the employee has the contractual right to receive those benefits *under the terms of the statute or ordinance prescribing the plan*." 1 Official Record Constitutional Convention, pp 770-771 (emphasis added). Compare, *O'Dea v Cook*, 169 P 366, 367 (1917) ("Where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself.").

³ See 1 Official Record Constitutional Convention, pp 770, 771, 774.

tax exemptions in the MPSEERA and other public retirement systems.⁴ In considering the issue, the Attorney General reached several conclusions as to how the tax exempt status of public pension benefits could be changed.

As to the statutory exemptions (*i.e.*, those established by a particular retirement act, like the MPSEERA), the Attorney General concluded:

Analyzing the statutory exemptions here at issue, there is little question that an exemption from taxation for pension benefits constitutes “financial benefits” within the meaning of Const 1963, art 9, § 24, since the exemption usually will result in greater net pension payments for the recipient. In Robert Tilove’s treatise, *Public Employee Pension Funds* (1976), *cited with approval* by Justice Williams for the unanimous Court in *Kosa v State Treasurer*, 408 Mich 356, 372 n 22; see also pp 372-373; 292 NW2d 452 (1980), the author, Tilove, in referring to public pension income tax exemptions generally, states: “[a]n income tax exemption has precisely the same effect as a benefit.” (At p 244.)

Id. at 119 (emphasis added).⁵

Because the tax exemptions arose under the terms of the statutes prescribing each plan, the Attorney General determined that those statutory exemptions would not be affected by the limitation or repeal of the *general* exemption set forth in § 30(1)(f) of the Income Tax Act. The Attorney General determined that the statutory

⁴ Specifically, the question was posed as:

Do the statutory exemptions of state and local public pension benefits from state income tax constitute accrued financial benefits which are protected by Const 1963, art 9, § 24, from legislative limitation or appeal?

⁵ The Attorney General’s analysis acknowledges what the State of Michigan had previously conceded in earlier litigation; that is, that tax exemptions for public employee pensions were used as an inducement to attracting and retaining qualified employees; that they were an “integral part of the retirement benefits conferred upon state employees.” *Davis v Michigan Dep’t of Treasury I*, 160 Mich App 98, 105; 408 NW2d 433 (1987). Although *Davis I* dealt with the State’s general income tax act, the result is the same under § 46 of MPSEERA.

tax exemptions conferred by the individual retirement acts were financial benefits arising under the acts themselves and therefore contractual obligations, protected by Const 1963, art 9, § 24, from diminishment or impairment after the employee had rendered service.⁶ The Attorney General concluded that in light of protections afforded by art 9, § 24, the Legislature could only prospectively limit or repeal the state and local tax exemption provisions contained in MPSERA.

The Attorney General's opinion was consistent with other cases to allow prospective modification to public employee pension statutes but which reject an attempt to diminish or impair benefits attributed to services already rendered. For example, in *Association of Professional & Technical Employees v City of Detroit*, 154 Mich App 440; 398 NW2d 436 (1986), the court rejected an attempt by the City of Detroit to unilaterally impose a new minimum retirement age that would have operated to delay retirement for some employees. In rejecting the new requirement, the court stated, "If Defendant City were allowed to impose this minimum age requirement, it would substantially delay the receipt of pension benefits *related to work already performed by Plaintiffs*." 154 Mich App at 446 (emphasis added). The court found that

⁶ Other states (whose constitutions did not have an art 9, § 24 counterpart) have found significance in the placement of a tax exemption -- whether included in the retirement statute or contained in a general income tax statute -- when considering an impairment of the contract argument. Compare, *Bailey v State of North Carolina*, 500 SE2d 54, 63 (1998) (finding an impairment of contracts due to the elimination of a tax exemption based, in part, on the fact that the tax exemption was located "alongside the other statutorily created benefit terms" in the retirement statutes, rather than in the general income tax code), with *Spradling v Colorado Dep't of Revenue*, 870 P2d 521 (1993) (finding no impairment, in part because the tax exemption was in the general tax code and not the retirement statute itself). See also, *O'Dea v Cook*, 169 P 336, 337 (1917) ("Where, as here, services are rendered under such a pension statute, the pension provisions become part of the contemplated compensation for those services, so in a sense a part of the contract of employment itself.").

the intention of the framers was not merely to protect pension benefits of retirees, but also to protect pension benefits related to work already performed by current employees. It concluded that the financial benefits of a pension plan accrue while the employee performs work for the employer. The court also rejected the notion that it would be permissible to require the plaintiffs to pay a \$175 yearly fee to continue under the terms of the pension plan. The court concluded the \$175 fee would constitute a direct diminution and impairment of vested pension benefits "related to work already performed by plaintiffs" in violation of art 9, § 24 of the state constitution. 154 Mich App at 447.

Similarly, in *Tinsman v City of Southfield*, unpublished opinion per curium of the Court of Appeals, issued December 3, 1999 (Docket No. 207035), *lv app den* 463 Mich 980; 625 NW2d 781 (2001), the Court of Appeals held that a change in the formula for calculating pension benefits negotiated by the City of Southfield in a collective bargaining agreement constituted an impairment of plaintiff's accrued financial benefits. The court found the change in calculation was an unconstitutional impairment of contract where it resulted in a lower pension for an individual. The court further noted that while a legislative body may increase pension benefits, it may not reduce the benefits with respect to "those individuals who have accrued rights under the pension plan at the time of the legislative enactment."

For members of the Michigan Public School Employees' Retirement System, the repeal or limitation of the *general* tax exemption in § 30(1)(f) of the Income Tax Act through 2011 PA 38 is not determinative of their right to a tax exemption of their pensions. What matters to these members, as well as those members of the other

retirement systems with their own statutory tax exemptions, is the repeal of those *specific* tax exemptions, attempted by 2011 PA 41 through 45.

Prior to the enactment of 2011 PA 38 and 2011 PA 42, members and retirees under MPSERA were entitled to receive pension benefits that were not subject to state or local taxation. However, beginning January 1, 2012, members and retirees who have accrued or are accruing a retirement allowance, an optional benefit, or any other benefit under the MPSERA will now be subject to taxation upon distribution of those benefits. Repealing the statutory tax exemption established by § 46 of MPSERA is no different than reducing the monthly retirement allowance, or eliminating the post-retirement escalator.

Art 9, § 24 must be construed in light of the problems it was intended to solve. Similar language did not exist in the Constitution of 1908. A review of the discussions from the Constitutional Convention related to art 9, § 24 reveals an explicit intention to create contractual obligations with respect to the terms incorporated in the various retirement statutes at the time the public employee rendered service. Because the MPSERA tax exemption was part and parcel of the "benefit structure presently provided," part of "the terms of the statute . . . prescribing the plan" at the time the employee rendered his service, the tax exemption became part of his constitutionally protected retirement contract that accrued with each year of service rendered under those terms.

2. **Elimination of the tax exemption diminishes and impairs the retirees' accrued financial benefits**

While the MEA submits that the right to a pension benefit free of taxes is part of the financial benefits that accrue with each year of service rendered, the end

result is the same if the tax exemption is not considered part of the accrued financial benefits of the retirement system. If it assumed for the sake of argument that a tax exemption is not part of the accrued financial benefits an employee earns through services rendered, the elimination of that tax exemption is nonetheless the device by which the State now diminishes those accrued financial benefits.

The elimination of the tax exemption is unconstitutional in either regard if it is used to tax benefits for services already rendered. A tax, by definition, is the taking of the property of a citizen by the government for its support. *CF Smith Co v Fitzgerald*, 270 Mich at 668. Even if the tax exemption embedded in MPSERA is not considered a part of the "accrued financial benefits," the elimination of the tax exemption is a taking by the state that undeniably diminishes the pension payments that have accrued to the members of the retirement system. While it may be permissible in certain circumstances for a state to eliminate a tax exemption where it has not made a constitutional promise to its public servants not to diminish or impair their accrued financial benefits, it is not permissible for Michigan to do so because of art 9, § 24.⁷

As explained in the next section, this result is in keeping with and indeed required in order to harmonize other provisions of the Michigan Constitution.

⁷ Both Ohio and New Mexico, while finding no impairment of contract by the elimination of a tax exemption on pension income, have noted that the end result is the same whether the government acts to reduce the pension or to tax the pension -- the pension is diminished. See *Herrick v Lindley*, 391 NE2d 729 (1979) and *Pierce v State of New Mexico*, 910 P2d 288 (1995). However, in neither case had Ohio or New Mexico made a constitutional promise not to impair public employee pension benefits. For an alternative analysis with facts more closely aligned to Michigan's, see *Hughes v State of Oregon*, 838 P2d 1018 (1992) (elimination of tax exemption impairs retirement contract; terms of employee pension plans may only be terminated prospectively). See also, *Bailey v State of North Carolina*, 500 SE2d 54 (1998).

3. **The contractual obligations protected by art 9, § 24 do not amount to a surrendering, suspension, or contracting away of the Legislature's power to tax in violation of art 9, § 2**

Proponents for 2011 PA 38 claim that prohibiting the repeal or modification of the tax exemptions for public pension benefits would be contrary to Mich Const 1963, art 9, § 2, which provides "[t]he power of taxation shall never be surrendered, suspended or contracted away." The power of the Legislature to levy taxes was contained in Mich Const 1908, art 10, § 2, and continued through Mich Const 1963, art 9, § 1. However, it is clear that the "power of taxation" includes the power to grant tax exemptions. *Lucking v People of the State of Michigan*, 320 Mich 495, 504; 31 NW2d 707 (1948); *WA Foote Memorial Hosp v City of Jackson Hosp Authority*, 390 Mich 193, 215; 211 NW2d 649 (1973) (tax exemption given to holders of notes and bonds was not an unconstitutional surrender of the state's power of taxation; rather, it was an exercise of that power).

The tax exemption in MPSERA is a variation of the type of exemption recognized in *Lucking* and *Foote Hospital*. It was included in the retirement statute as one of the financial benefits offered to attract and retain qualified employees in public service. The tax exemption is part and parcel of the retirement contract of the members of the MPSERA system, just as the tax exemption granted to holders of state or municipal bonds is part of their contract. The State may no more retroactively eliminate the tax exemption after the bond is purchased than it may cancel the tax exemption of MPSERA after service has been rendered under the terms of the retirement statute. See *Murray v City of Charleston*, 96 US 432, 443-446 (1878); *United States Trust Co v New Jersey*, 431 US 1 (1977).

It is wrong to argue that the Legislature's constitutional power to tax is unlimited. The Legislature's power of taxation is itself subject to the Constitution. *Harsha v City of Detroit*, 261 Mich 586; 246 NW 849 (1933). And the Michigan Constitution contains at least two limitations on the Legislature's power to tax. The first is art 1, § 10, which is general, and which, *inter alia*, prohibits the Legislature from passing any law impairing the obligation of contracts;⁸ and a second specific and direct prohibition (art 9, § 24) prohibiting the state from taking any action to diminish or impair accrued financial benefits of the state and its political subdivisions.

Each of these constitutional provisions is of equal dignity and each must be harmonized in their application to the facts presented. The correct approach, the MEA submits, is to recognize that public employee pension benefits that have accrued with each year of service may not now be diminished by the imposition of tax on those benefits. The Legislature, however, may tax future financial benefits which are yet to accrue to public employees under the various retirement systems. That is the only way

⁸ It has long been recognized that a constitutional prohibition against the impairment of contracts is a limitation upon the taxing power of the state. As stated in *Murray v City of Charleston*, 96 US 432, 444-445 (1877), "We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts. The change of the expressed stipulations of a contract . . . can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. *The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional limitation.* It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'you need not pay to your creditor all that you promised him'. . . . Much less can a city say, 'we will tax our debt to you, and in virtue of the tax withhold a part for our own use.'" (emphasis added.)

forward that permits the state to keep its constitutional promise to those who have rendered service in reliance on the "benefit structure presently provided," while changing the benefit structure with respect to future service.

II. REDUCING OR ELIMINATING THE STATUTORY TAX EXEMPTION FOR PUBLIC-PENSION INCOMES IMPAIRS A CONTRACTUAL OBLIGATION IN VIOLATION OF MICH CONST 1963, ART 1, § 10 AND US CONST, ART I, § 10(1)

A. Standard of Review

The interpretation of a statute, including its constitutionality, presents a question of law which is reviewed *de novo*. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005).

B. Discussion

The Constitutional Convention resulting in the Constitution of 1963 made clear that public employee pension benefits are contractual obligations, and that the terms of those contracts are to be found in the retirement statutes prescribing the pension plan in question. For public pensions arising under MPSERA (and several other state systems), the right to a tax exemption is one of the contractual terms of the pension obligation. To the extent that 2011 PA 38 and 2011 PA 42 purport to eliminate that tax exemption for services already performed, 2011 PA 38 and 2011 PA 42 are in violation of the contract clauses set forth in Mich Const 1963, art 1, § 10 and US Const, art I, § 10.

Even prior to art 9, § 24, which was adopted to erase all doubts on the question, this Court held that retirement benefits to public employees under government pension plans were contractual in nature and subject to protection under the general

non-impairment clauses in the Michigan and United States Constitutions. Writing for the majority of the Michigan Supreme Court in *Campbell v Michigan Judges Retirement Bd*, 378 Mich 169; 143 NW2d 755 (1966), Justice Dethmers discussed the contractual nature of the statutory retirement plan for judges:

Mich Const of 1908, art 2, § 9, followed by Mich Const 1963, art 1, § 10, and art 1, §10, of the United States Constitution, prohibit the impairment by state law of the obligation of a contract. Vested rights acquired under contract may not be destroyed by subsequent State legislation or even by an amendment of the State Constitution.

Id. at 180.

On behalf of the majority, Justice Dethmers further concluded:

We hold that a **valid contract was entered into between judges and the State**, that the State's agreement thereunder to pay the judges certain benefits **created vested rights** for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment. **The Legislature may add to but not diminish benefits without running afoul of constitutional prohibition against impairment of the obligation of a contract.**

Id. at 181 (emphasis added).

Since *Campbell* was commenced prior to the adoption of Mich Const 1963, this Court's decision was based on the general non-impairment clauses found in the Michigan and United States Constitutions, not art 9, § 24 (which compels the same result).

The case of *Hickey v Pension Bd of City of Pittsburgh*, 106 A2d 233 (1954), decided by the Pennsylvania Supreme Court, is also instructive. Mr. Hickey had completed 20 years of service and had attained age 60, which permitted him to retire

when the Pennsylvania Legislature amended the retirement statute to authorize the withholding of a pension from a retired employee who secured new public employment. The trial court dismissed Mr. Hickey's complaint.

In reversing and remanding the case to the trial court, the Pennsylvania Supreme Court held that retirement pay is “delayed compensation” for services rendered in the past, and that an employee's participation in a public retirement system fulfills the elements of a contract. The court then stated:

If Hickey is party to a contract, the Legislature may not impair that contract. Hickey agreed to work for the City 20 years and to pay certain sums into the Pension Fund. He has fulfilled those conditions. The City agreed, in its turn, to pay Hickey a pension or *compensation* for the remainder of his life when he received his 60th year. Shutting off the pension because he obtained employment elsewhere is refusal on the part of the Pension Fund to abide by its contract. If this contract had been entered into between a private individual and a private corporation, it is unquestioned that the Legislature could not impose an additional condition for its fulfillment. The law does not change because one of the parties is a governmental agency.

* * *

The Legislature may from time to time, within the confines of the established relation, alter, change, amend, and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit.

The Legislature may strengthen actuarial fibers, but it cannot break the bonds of contractual obligations. The permissible changes, amendments, and alterations provided for by the Legislature can apply only to conditions in the future and never to the past.

Id. at 236-237 (emphasis in original; citation omitted).

Hickey set forth a legal, contractual, and moral basis for public employee pension benefits that is entirely consistent with this Court's decision in *Campbell*.

The case of *Washtenaw Community College Ed Ass'n v Bd of Trustees of Washtenaw Community College*, 50 Mich App 467; 213 NW2d 567 (1973), also provides guidance. There, the Court of Appeals invoked the general non-impairment clause in US Const, art I, § 10, in holding that certain legislation impaired the contractual obligation of the college to its employees under its collective bargaining agreement with a union. In that case, the collective bargaining agreement provided that the college would make up to a 5% contribution to a private retirement fund on behalf of the employee. Subsequent legislation directed all colleges to contribute to only one retirement fund, the Michigan Public School Employees Retirement Fund. The Court of Appeals held the subsequently passed legislative act illegally impaired the college's contractual obligation to its employees in violation of US Const, art I, § 10.

As others participating in this case have pointed out, the elimination of the tax exemptions found in 2011 PA 38, 2011 PA 42, and the other related retirement system amendments, will diminish the pension benefits of public employees by hundreds of millions of dollars by fiscal year 2012-13.⁹ By any measure, the elimination of the tax exemption constitutes a significant impairment of our members' retirement contract under the contract clauses of the state and federal constitutions and is unconstitutional.

⁹ See House Fiscal Agency Memorandum, *Description of Recently Enacted Personal Income Tax Changes with Taxpayer Examples* (July 8, 2011).

RELIEF

Amicus MEA respectfully requests this Court to conclude that 2011 PA 38 amounts to an unconstitutional violation of art 9, § 24 and art 1, § 10 of the Michigan Constitution, as well as art I, § 10 of the United States Constitution.

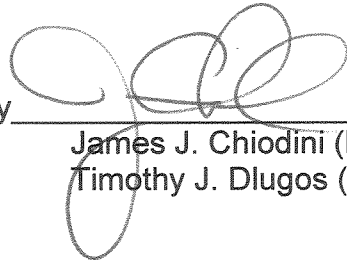
Amicus MEA further urges this Court to likewise find 2011 PA 42 unconstitutional on the same basis.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Amicus MEA

Dated: August 31, 2011

By

A handwritten signature in dark ink, appearing to be 'J. Chiodini', written over a horizontal line.

James J. Chiodini (P38834)
Timothy J. Dlugos (P57179)